(23,264)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 689.

THE WYNKOOP, HALLENBECK, CRAWFORD COMPANY, APPELLANT,

vs.

THOMAS J. GAINES, JR.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1912.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of THE PARIS MODES COMPANY, Bankrupt; WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellant.

Appeal.

Printed under the direction of the clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1911. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

Decision of Referee.

On Objections to Claim of Thomas J. Gaines, Jr.

The Paris Modes Co. was adjudicated bankrupt on March 28th, 1910. It was then hopelessly insolvent and had been actually
2 insolvent from its inception in 1906, being kept going by borrowed money. It was capitalized at $200,000, but only $50,000 in cash and property was ever paid in. The Company was organized by one Hudson to take over the assets of a defunct corporation purchased by him. Hudson needing working capital, sought out Mr. John S. Huyler, a wealthy merchant in this City, and put the situation before him. Mr. Huyler had a nephew, Thomas J. Gaines, Jr., in whom he was interested and desired to start in some profitable business. Seeing an opportunity in the Hudson scheme, he introduced Gaines to Hudson, and after some slight investigation by Huyler, Hudson agreed to give Gaines a half interest in the Company, in consideration of his paying into the Treasury $12,000 in cash. The money was furnished by Huyler "as a present" to Gaines, and paid in by Gaines in instalments as needed.

No certificates of stock were actually issued, but an agreement was made (January 17, 1906) by which Gaines and Hudson should each receive "50% of the capital amounting to $50,000" in consideration of property transferred to the Company. Out of this the parties agreed to deliver 5% to Huyler, for the purpose as stated by Huyler, to enable him to act as mediator or arbitrator, in case of difficulties in the management. Hudson was elected President and Gaines Treasurer. More money being needed from time to time, Huyler began a series of advances to the Company, culminating in October, 1909, at which date he held demand notes of the Company amounting in the aggregate to $249,500. Notes aggregating $134,-

700 were made payable directly to Huyler; $157,300 to Thomas J. Gaines and later $25,000 to Mrs. Gaines, his mother.

On October 7, 1909, Huyler wearying of these continual drains, entered into an agreement with Gaines, to assign to Gaines
3 all Huyler's right, title and interest in the assets of the Company and all the said promissory notes, upon consideration that Gaines would hold him harmless from any past, present or future indebtedness of the Company and would not ask for any further loans, directly or indirectly to the Company or himself. Huyler testified that he intended to make Gaines a present of the notes and put him in a position where by controlling the indebtedness he might be enabled to interest outside capital (1st Mtge., p. 190). Subsequently, he advanced $10,000 additional and took up a Company note of $10,000, which he had endorsed. These notes were also assigned to Gaines prior to the bankruptcy.

Gaines' mother then made advances aggregating $25,000 between November 20, 1909, and February 5th, 1910, and her notes have also been assigned to her son.

In the bankruptcy proceedings, Gaines filed a claim for these notes, as the owner and holder thereof, aggregating $327,000. The Trustee objected that Gaines had received a preferential payment of $1,500 on said loan account, which is admitted, but it was shown that subsequently, Gaines made a further advance to the Company of $2,000 on February 11, 1910, which he claims as a set off. The claim for set off should be allowed (Kaufman vs. Tredway, 195 U. S., 271; Bankruptcy Act, Sec. 60, Sub. c), and the claim is therefore reduced to $325,500, and allowed as against the Estate at that sum.

Intervention of Wynkoop, Hallenbeck, Crawford Co.

Wynkoop, Hallenbeck, Crawford Co., a corporation, and a creditor of the bankrupt scheduled in the amount of $24,120.80 filed a petition for re-examination of the Gaines claim and was allowed to intervene pro interesse suo.

4 This petition sets forth the claim of Thomas J. Gaines, Jr., and alleges that the bankrupt's notes were given by Gaines while acting as Treasurer or President of the bankrupt without the knowledge of other creditors; that the bankrupt had from its inception been insolvent but that knowledge of insolvency had been purposely concealed from its creditors by Gaines and others; that during the years 1906 to 1910, Gaines, Huyler and others, acting in privity with them and with their knowledge represented to petitioner that the Paris Modes Co., was amply solvent and fully able to meet all its outstanding obligations; that this representation was made with knowledge of its falsity and for the purpose of obtaining credit from petitioner and others; that relying upon the truth of these representations the petitioner did extend to the bankrupt and to Gaines the credit upon which the indebtedness accrued.

It was further alleged that in the year 1905, and subsequent to the filing of the certificate of incorporation the bankrupt through

its duly recognized officers violated the Corporation Law of the State of New York, in that a certificate showing that fifty per cent. of its capital stock required by law had been fully paid, was false and that said fifty per cent. had never been subscribed or paid in, and that no certificates of stock had been issued.

It is also alleged that the notes of the bankrupt are not signed and countersigned as required by the By-Laws.

As to the failure to comply with the Corporation Laws, it is sufficient to say that the certificate of payment of one-half of the capital stock which is claimed to be untrue, was executed by Hudson, the first President, before Gaines obtained any interest in the Company, and thus could not affect his individual claim as a creditor in this proceeding. The capital of the Company stated in the Certifi-
5 cate of Incorporation was $200,000. All that was actually paid in was the property of the Modes Fashion & Pattern Co., for which 490 shares of stock were issued to Gaines and Hudson, the remaining 10 shares being issued for cash,—Gaines did not execute the certificate in person, Hudson is dead. Whatever remedy the creditors may have under the State Law for the filing of a false certificate, no relief can be obtained in this proceeding. Gaines and Hudson both seem to have acted on the assumption that the capital stock had been validly reduced to $50,000.

Most of the notes were executed in the name of the Company by Thomas J. Gaines, as President or Treasurer. So far as appears by the by-laws and minutes, his signature was sufficient. No express authorization of the notes appears in the minutes, but that is not necessary to bind the corporation, where it has taken the proceeds and used them in its business, as was admittedly done in every instance (Davies v. Harvey Steel Co., 6 App. Div., 166).

The main contention of the petitioner rests on the proposition that Gaines is equitably estopped from having his claim against the bankrupt estate allowed as against petitioner, because of certain misrepresentations and concealment of material facts by him as an officer of the bankrupt, upon which the petitioner relied to its loss.

It appears that the bankrupt carried on a business of manufacturing patterns for women's clothing and published in connection therewith, a magazine known as Paris Modes. The petitioner was the printer of the magazine from the outset, and prior to the month of May, 1909, the printing work was done on a cash basis or "thirty day account." Up to that time, the bankrupt was not asking credit of any one—its necessities being supplied by the Huyler loans above referred to.

6 On May 11th, 1909, the President of the bankrupt wrote to the Petitioner asking for "Ninety days' additional credit," owing "to increased business and also to the fact that we expect to largely increase the circulation of the magazine during the next three or four months." (See Intervenor's Exhibit "B," Oct. 11th, 1910; and Test., p. 41.)

The letter was received by Hallenbeck, the Treasurer and credit manager, who sent to Dun's Mercantile Agency, of which his Com-

pany was a subscriber, for a report on the bankrupt and received on the 14th day of May, 1909, the following:

"Paris Modes Company, New York City.

Thomas J. Gaines, Jr., President.
Harry A. Brown, Secretary.
William Eagleson, Treasurer.
Sept. 3d, 1908. 36 West 24th Street.

The above was incorporated under New York State laws October 31st, 1905, with an authorized capital of $200,000, succeeding the Modes Fashion and Pattern Company at 62 Grand Street, which concern got into financial difficulties and whose assets were purchased by the Paris Modes Company under foreclosure of a chattel mortgage in November, 1905. Later, in 1906, the authorized capital was reduced to $50,000. The original officers were William H. Judson, President, Harry A. Brown, Secretary, and Thomas J. Gaines, Jr., Treasurer. William H. Hudson died on August 18th, 1908.

No complete financial statement has ever been made, but in July, 1906, *Thomas J. Gaines, Jr., Treasurer, stated verbally that on June 30th, 1906, they had accounts and bills receivable of* $7,300, *cash on hand of* $1,700, *with liabilities of* $2,500.

7 William H. Hudson, the former President, stated in August last that the authorized capital was $200,000, having formerly been reduced to $50,000, but was again changed to $200,000, the original figures.

Thomas J. Gaines now states that the officers are now as above: At an election held since the death of William H. Hudson, he, Gaines, was elected President, Harry A. Brown retaining the office of Secretary and William H. Eagleson, who had been his, Gaines', assistant, was elected Treasurer and also a director to fill the vacancy caused by the death of W. H. Hudson. Says that while business fell off during the dullness of the past six or eight months, *it has again improved and is now in good shape, are owing nothing but short time current bills.* As it has never been the policy of the officers to make a complete statement, he does not wish to do so now. Regarding the arrangement as stated by Mr. Hudson about August 1st last concerning the intention to have additional cash paid in, he says nothing further has been done in this direction. Does not care to give figures.

Authorities consulted at present selling them say they do so with confidence up to moderate requirements and that they pay promptly, *often discounting bills.* Although a statement is unobtainable as to actual worth, they are regarded as doing a very fair business.

H. S."

(Italics not in original.)

"Paris Modes Company, New York City.

March 17th, 1909. 36 & 44 West 24th Street.

William H. Eagleson, the Treasurer, states that there has
8 been no change in officers, directors or capital since the death of W. H. Hudson in August 1908, and the subsequent election of the present board, as given in report of September 2rd, 1908. *Says that since then they have added to their resources, the business is in a prosperous condition and they are only owing for usual current bills.* That their publication 'Paris Modes' now has a large circulation *and they are in a position to discount all they buy*, but does not care to make a financial statement.

This concern has an established credit with several houses in this city and believed to be *doing a prosperous business* notwithstanding the dullness of the past year. An important part of their business is the publication of a monthly periodical known as 'Paris Modes', which it is claimed has now attained quite a large circulation. Authorities consulted at this time who have been selling them since the start, say they give evidence of doing a good business and believe them to have added to means as claimed. Although an estimate is not obtainable, as to actual worth, they are reported as discounting their bills, being sold in some cases to the extent of $2,000 to $3,000 at a time. The officers as last given are Thomas J. Gaines, Jr., President, Harry A. Brown, Secretary, William H. Eagelson, Treasurer; they have been with the concern since the start.

J. S."

(Italics not in original.)

"Paris Modes Company.

April 23rd, 1909. 36 & 44 24th Street.

In regard to a branch at 190 Fifth Avenue, Chicago, Ill., it is stated at their offices that this is correct. That they have a full recognized branch at that address."

9 (Intervenor's Exhibits for identification "C," "H" and "K," of Oct. 11th, 1910; later marked in evidence subject to a motion to be stricken out if they were not connected; test., p. 47; also test., pp. 42, 43, 44 & 45.)

On receipt of these reports and on the same day that they were received, to wit: May 14th, 1909, the creditor wrote the bankrupt demurring to allowing them the full ninety days' additional credit, but stating: "We would be glad to extend you as much credit as possible, but we do not see how we could extend over sixty days." (Intervenor's Exhibit "D," Oct. 11th, 1910; test., p. 43.)

Again, on May 19th, 1909, the President of the bankrupt wrote the creditor asking for a further extension. (Intervenor's Exhibit "E"; test., p. 43.) And on May 20th, 1909, the creditor gave a qualified consent. (Intervenor's Exhibit "F"; test., p. 43.)

Again, on June 3rd, 1909, the creditor *addressed a letter to the President of the bankrupt* in the following language:

"I have been talking the matter over with Mr. Hallenbeck after you left and *I find him very desirous to make things as pleasant for you as possible*, but of course he does think, just as we all must, *that four months is a pretty long stretch* and the whole thing has to come out of the pay roll which must be paid each week."

(Italics not in original.)

Intervenor's Exhibit "G"; test., p. 44.)

Hallenbeck testified that the Dun reports above specified and the information received from the office of the Secretary of State, that $100,000 of the capital stock had been fully paid in, was the only knowledge which this creditor had of the financial condition of the bankrupt, and it had no other means of knowledge than these. (See test., pp. 45 & 46.)

(Intervenor's Exhibits No. 5, Sept. 11, 1910; No. 4, Sept. 11, 1910; and No. 3, Sept. 11, 1910.)

Payments being in default, the petition in Bankruptcy was filed in March, 1910, by the Wynkoop Company, and the adjudication followed, March 28th, 1910.

The Schedules show liabilities of $405,039.50 as against nominal assets of $23,419.84. The Trustee's report shows that he has in hand a balance of $16,896.10. Of the liabilities, the larger part ($327,000) is due and owing to Gaines on the notes above referred to.

In order to create an estoppel in pais, the intervenor must show (1) that the representations were made by Gaines himself or with his knowledge and approval, (2) that the intervenor believed and relied on the representations in whole or in part, and changed its position in consequence thereof.

These facts being established, the intervenor must further show (3) that the claims asserted by Gaines in this proceeding, belong to Gaines in his own right and (4) belonged to him at the time the representations were made.

What representations did Gaines make?

The Mercantile Agency statement of September 8, 1908 (Exhibit H), is the only statement purporting to quote Gaines personally. The others (Exhibits J, K, L) quote Eagleson or Hudson as the informant. There is no evidence connecting Gaines with the Eagleson or Hudson statements, and whatever may be the corporation's liability therefor, clearly Gaines individually is not bound by them. The mere fact that Eagleson was Gaines' confidential man, is not sufficient to connect Gaines with his statements.

Gaines' representations are to be found, if anywhere, in the statement of September 3rd, 1908 (Exhibit H), which was obtained by the intervenors on May 14, 1909. The reporter, testifying from his files, confirmed the interview with Gaines as set forth in the statement. Gaines admits that the report of this interview is substantially correct, except as to the statement that "they are owing nothing but short time current bills." That he denies

having said. He admits, however, that his statement as to "liabilities of $2,500" was incorrect at the time it was made, as he had failed to take into consideration $8,000 in notes payable to his order then outstanding (p. 84). He was not the holder of the notes, as they had been delivered to Huyler, as previously explained. But the circumstance is significant as showing that the witness did not then regard these notes as business obligations, and so might well have made the further statements attributed to him at this interview. His Company was not asking for credit at the time, and no particular harm could then result from such a gratuitous statement. I conclude (with some hesitation, in view of Mr. Gaines' denial) that he made substantially the statements attributed to him in the Report (Exhibit H), but without fraudulent intent, for no credit was then sought. The report itself (with the Reporter's testimony) is material and competent evidence, and when communicated to the intervenors the representations are to be given the same effect as if made to them personally (Eaton, Cole & Burnham Co. v. Avery, 83 N. Y., 31; Davis vs. Louisville Trust Co., 181 Federal, 10.)

The report was untrue, for at the date (September 3rd, 1908) the Company owed to Huyler & Gaines on its notes, $199,500 (p. 84). The business had never been profitable and showed a net loss at the end of 1907 of $84,260.13, which was transferred out of profit and loss account to a new account called "Goodwill" (p. 20):

12 On June 30, 1908, the net loss was $17,451.78. During the period down to the appointment of the Receiver herein, the total loss was $268,477.77 (p. 30). The Company had always been insolvent. Hallenback, the Treasurer and credit man of the intervenor, received this report (with the others mentioned) on May 14, 1909. The Company was a subscriber to the Dun Agency, and Hallenback applied to it for a report on receiving Gaines' letter asking credit. He did not ask the Bankrupt for a special statement, nor was any signed statement ever issued. Hallenback testified (p. 15) that he had no knowledge of the financial condition of the Bankrupt, other than as set forth in these Reports and its certificate of incorporation. After receiving these he wrote the Bankrupt that he would extend thirty days' further credit (Exhibit D). This was accepted by Gaines in letter of May 19th (Exhibit E), with certain modifications, which were noted, but not definitely accepted by Hallenback in letter of May 20th (Exhibit F). On June 3, Hallenback wrote the letter (Exhibit G), suggesting that notes be given bearing interest, and this arrangement appears to have been acquiesced in by both parties.

I think it is a fair inference that the intervenor extended the new credit terms, in reliance on the agency reports, or at least in part reliance thereon. It is not necessary that the Gaines representations should have been the sole and exclusive consideration for the credit, but only that they were a material consideration, without which in all probability, the credit would not have been given (In re Gany, 4 Am. B. R., 576). It is true that in the Gany case the creditor swore that he did rely on those representations. Hallenback did not so testify in express terms that he relied on them, but it was natural that

he should have done so, and the circumstances point irresistibly to that conclusion.

13 I think that the main elements of an estoppel exist in this case. There were misrepresentations by Gaines as to certain facts, as they existed on September 3, 1908. Further credit was obtained after these reports had been secured. The company was actually insolvent. The intervenor was lulled thereby into a false sense of security, when, if the real facts had been stated, no sane business man would have extended credit. It is true that every interference must stand upon some clear, direct evidence and not upon some other inference or presumption (Lamb vs. Union Railway Co., 195 N. Y., 260). But the sequence of Gaines' letter, the agency Reports, containing Gaines' statement and the granting of credit, is a chain of direct evidence from which the inference of reliance may safely be drawn.

This brings us to the final and controlling question in the case: Did the claims asserted by Gaines herein belong to him in his own right and did they so belong to him in September, 1908, when his representations were made?

The equitable doctrine of estoppel requires the person making representations of existing facts to the prejudice of another to be treated as if the representations were true. It is unnecessary to prove actual fraudulent intent to work an estoppel. It is enough that the act was calculated to mislead and did mislead another. (Blair vs. Wait, 69 N. Y., 113; Turner vs. Ward, 154 U. S., 618; In re Epstein, 109 Fed. Rep., 875; Davis vs. Louisville Trust Co., 181 Fed., 10.)

Under this rule Gaines would be precluded from showing that on September 3, 1908, the Bankrupt Company owed for anything except "current bills," so far as relates to the enforcement of his own claim in competition with the intervenors. The estoppel is personal to him and cannot be extended to the claims of others.

14 It is the contention of the intervenors that these notes at all times belonged to Gaines in his own right. If so, the estoppel would be absolute. But the evidence does not bear out this contention.

It is undisputed that Huyler furnished all the working capital of this Company, with the exception of $25,000, which was furnished by Gaines' mother. Notes representing these advances and made payable as follows:

Total payable to Thomas I. Gaines, Jr.	$157,300
" " " John S. Huyler	134,700
" " " M. A. Gaines	25,000
" " " "ourselves," endorsed by Huyler & Gaines and taken up by Huyler	10,000
	$327,000

Whenever Huyler drew checks to the order of the Paris Modes Company he received notes direct to him as payee. He held these notes in his possession until the agreement of October 7, 1909, with

Gaines, when they were assigned to Gaines "without recourse." As Gaines was not the holder of these notes at the time of the Report of September 3, 1908, when the transactions relied on as an estoppel occurred, his acts could not affect the rights or title of Huyler, who was the owner and holder of the notes. Gaines long subsequently acquired title to these notes by assignment from Huyler. This vested him with all Huyler's rights, entirely unaffected by Gaines' previous acts. Gaines is not here asserting any claim that accrued to himself, but the claims he presents are those which accrued to his uncle and to his mother. Standing in their shoes, nothing is a defence against him which could not have been urged against the assignors, if no transfer had been made (Chapman vs. Gates, 54 N. Y., 132).

As to the portion of the claim represented by the Huyler notes $134,700 and Mrs. Gaines' notes $25,000, no estoppel can be urged.

The remaining notes were made payable directly to Gaines, and the evidence shows that in those cases Huyler drew his checks to the order of Gaines who put the checks through his private bank account and drew his own checks to the order of the Company. As these payments were made Company notes were issued to the order of Gaines, who delivered them either to Huyler's Secretary or to his attorney Fulton. In some instances Gaines gave his own check to the Company before receiving Huyler's checks and was reimbursed by Huyler soon afterwards. The notes were not endorsed by Gaines, but delivered to Huyler or his attorney, as stated, and remained in Huyler's possession until redelivered to Gaines in October, 1909.

All these advances, whether by Huyler direct or through Gaines, appear on the Ledger of the Company under the one heading "Personal account," except that for a short time, between January 10, and June 6, 1908, advances aggregating $41,000 appear under the heading "J. S. Huyler account." There was no other distinction made on the books, between those several advances, and the entry appears to have been used as a mere memorandum of all borrowings.

Huyler, in his testimony, makes no distinction between his payments direct to the Company or through Gaines, and none can be discovered from the evidence. Huyler testified that he loaned his money to the Company and did not look to the personal responsibility of Gaines (p. 183). His intention was to start his nephew in business and he was willing to hazard his money to that end (p. 185). In furtherance of the same benevolent purpose, he later made him a present of the notes "to put him in a position where he might be enabled to interest outside capital" (p. 190). Gaines indeed, testified that he treated the loans as made to himself and by him to the Company. "I expected to pay "that money back to Mr. Huyler, if the Company was a success. "If I could pay it out of earnings, that is, my share of the earn-"ings. I expected to pay it back to Mr. Huyler" (p. 62). But this interpretation does not accord with Huyler's actions.

I can see no distinction, therefore, between the Gaines notes and the Huyler notes. All represented Huyler's advances, Gaines' failure

to endorse the notes, before delivery to Huyler, is unimportant. "Where a negotiable instrument is transferred without endorsement, "it is treated as a chose in action assigned to the purchaser."

(Goshen Nat. Bank vs. Bingham, 118 N. Y., 349, 355). The absence of endorsement would, of course, let in any defences between Gaines and the Company, but the delivery was complete without it. Gaines was merely the conduit by which Huyler's money reached the Company.

I therefore conclude that Gaines had no interest in these notes at the time when the representations were made, and that the subsequent assignment to him, vested him with all of Huyler's rights in said notes unaffected by Gaines' previous acts, as in the case of the other notes.

For these reasons, I am constrained to hold that the prayer of the intervening petition be denied, and the claim allowed to participate equally with the intervenors in any dividends.

Dated February 17, 1911.

STANLEY W. DEXTER,
Referee in Bankruptcy.

17 District Court of the United States, Southern District of New York.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

Petition to Review Decision of Referee in Respect of the Claim of Thomas J. Gaines, Jr.

Mr. Wolff for objecting creditor Wynkoop, Hallenbeck Crawford Company.

Mr. Crawford for Gaines.

Memorandum.

Though the papers in this matter have been held for a long time, little has been found to say on the subject.

Some argument has been directed against the Referee's findings of fact, but these findings are in my judgment right. There is nothing for consideration but an extremely interesting question of law, which may be summarized as follows:

Gaines as an officer of the bankrupt falsely stated that the liabilities of the Paris Modes Company were but $2,500 on or about September 8, 1908. This statement (in conjunction with other statements then made) asserted the company to be thoroughly solvent, whereas in fact it was grossly insolvent and at the time owed to Gaine's uncle, John S. Huyler, $199,500.

On the faith of this misrepresentation, the Wynkoop, Hal-
18 lenbeck Company extended credit to the Paris Modes Company, and thereby became a creditor to a considerable extent. At a later date, Gaines, by a gift from his uncle, became the owner of Huyler's demands, and now propounds them against the

assets of the bankrupt. The Wynkoop Company moves that said claims be postponed or rendered junior to its claim, asserting Gaines to be estopped by his own act from claiming equality in the distribution with a creditor injured by his misrepresentation.

The Referee has held that in order to successfully assert this estoppel it must appear that "the claims asserted by Gaines in this proceeding, belong to Gaines in his own right and belonged to him at the time the representations were made."

But the findings of fact preclude a declaration that the claim now advanced "at all times belonged to Gaines in his own right." Therefore the conclusion is that since Gaines acquired Huyler's claim after he had made misrepresentations concerning said claim, he can stand in Huyler's shoes and successfully pose as a creditor just as Huyler could have done and do so unaffected by his own act committed before his uncle gave him the notes in suit.

This result, at which the learned Referee has certainly arrived with regret, is based on Chapman vs. Gates, 54 N. Y., 132.

In my opinion there is no escape from the Referee's conclusion if the case last cited be accepted as a declaration of the law, for it is there asserted that an assignee may assert the right of his assignor unaffected by any previous act of his done or committed before he acquired the title upon which he stands.

This act being a matter peculiarly of New York law,—and the amount involved fully warranting an appeal to the Appellate Court,—I feel at liberty to express my decision from the doctrine of Chapman v. Gates. It is in my judgment opposed to the very nature of estoppel, which has long been defined as "an impediment or bar by which a man is precluded from alleging or denying a fact in consequence of his own previous act, allegation or denial to contrary."

The particular estoppel here under consideration (viz., by misrepresentation) admittedly becomes effectual only when it induces a change of position on the part of another, "in accordance with the real or apparent intention of the party making the misrepresentation and against whom therefore the estoppel is alleged."

In Morgan vs. Railroad Co., 96 U. S., at 720, Swayne, J., said, that the person estopped "is not permitted to deny a state of things which by his culpable silence or misrepresentation he had led another to believe existed, and who has acted accordingly upon that belief."

Such reference as the foregoing might be greatly extended, but they all illustrate this truth, that that which is estopped is not a claim, a demand or a thing, but a man. The reason for estoppel by misrepresentation is a wrong committed by a particular person, and how that person can better his situation by acquiring the right of another without undoing the wrong that he has committed is to me beyond comprehension.

It seems no answer to the foregoing to say that (in this instance) Huyler could have advanced his demand unaffected by Gaines' misrepresentations. This is perfectly true, but the reason of it is that no estoppel existed against Huyler. But when Huyler's claims

became Gaines' claims the estoppel still existed because it attached to the person of Gaines and not to the claim or person of Huyler.

The very object of estoppel is to prevent any man gaining advantage by his own wrong, and no clearer instance could be
20 furnished than this litigation of how Gaines would profit by his own wrong if he were to share pari passu with the man he wronged,—because he would be permitted to get and keep a dividend on claims which if they had been known and not concealed by him would certainly have prevented the sales on credit which not only probably but actually have produced the assets now for distribution.

It, therefore, appears to me that the language of the Court in Chapman v. Gates, supra, does not state the law, and that the law is stated by the Court in Bitting and Waterman's Appeal, 17th Pa. Stat., 211.

It is, therefore, directed that the claim of Gaines in so far as it represents demands in existence at the time that misrepresentations were made, be postponed to that of the Wynkoop Hallenbeck Company. The matter is remitted for further proceedings in accordance with this opinion.

May 28, 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) Filed May 23, 1911.

The fullest effect I can imagine, has been given the doctrine of estoppel in the memorandum filed. The Creditor's position on this motion would nullify any claim in the hands of a creditor whose conduct a Court thought inequitable,—the position of Gaines is opposed to the findings of fact made by Mr. Dexter, in which I have already concurred.

Motion denied.

6/20/11.

C. M. H., *D. J.*

(Endorsed:) On Motion papers. Filed June 12, 1911.

21 At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court House, in the Post-Office Building, City of New York, on the 22nd Day of June, 1911.

Present: Hon. Charles M. Hough, District Judge.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

The petition of the Wynkoop, Hallenbeck, Crawford Company, a creditor of the above-named bankrupt, to review the decision of the Referee in respect of the claim of Thomas J. Gaines, Jr., having

duly came on to be heard before this Court, on the 8th day of May, 1911,

On reading and filing the petition for review, the order of Hon. Stanley W. Dexter, Referee, dated March 6th, 1911, the Referee's certificate on review, dated March 28th, 1911, with the papers therein recited and therewith submitted, the notice of motion, dated April 7th, 1911, and upon all the papers and proceedings had and taken herein, and after hearing William Otis Badger, Jr., and Louis J. Wolff, Esqrs., of Counsel for the Wynkoop, Hallenbeck Crawford Company, the petitioner herein, in support of said petition, and John J. Crawford, Esqr., of counsel for Thomas J. Gaines, Jr., in opposition thereto, and due deliberation having been had thereon, it is

22 Ordered, that the order of the Referee allowing the claim of Thomas J. Gaines, Jr., at the sum of Three hundred and twenty-five thousand five hundred Dollars ($325,500) upon the list of claims herein, be and the same hereby is modified to the extent that the claims presented by Thomas J. Gaines, Jr., representing indebtedness of the bankrupt, which existed on the 3rd day of September, 1908, shall be postponed to the claim of the Wynkoop, Hallenbeck, Crawford Company.

C. M. HOUGH, *D. J.*

(Endorsed:) Order filed June 22, 1911.

United States District Court, Southern District of New York.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

This Court having by an order filed June 22nd, 1911, decreed that the claim of Thomas J. Gaines, Jr., representing indebtedness of the bankrupt, which existed on the 3rd day of September, 1908, be postponed to the claim of the Wynkoop, Hallenbeck, Crawford Company, because of misrepresentations made by the said Thomas J. Gaines, Jr., it is

23 Ordered, that the dividend on the sum of One Hundred ninety-nine thousand Dollars ($199,000) of the claim of Thomas J. Gaines, Jr., being that portion of the claim representing indebtedness of the bankrupt at the time of the misrepresentations, be paid to the Wynkoop, Hallenbeck, Crawford Company.

Dated, August 3rd, 1911.

STANLEY W. DEXTER,
Referee in Bankruptcy.

(Endorsed:) Filed August 3, 1911.

District Court of the United States, Southern District of New York.

In the Matter of PARIS MODES COMPANY.

Petition to Review Referee's Certificate.

Brush & Crawford, for Petitioner Gaines.
William O. Badger, Jr., Trustee.

Memorandum.

Mr. Dexter's order is, in my judgment, the necessary corollary to the decision of the Court in this matter.

That decision was that the claim of Gaines should be postponed to that of the Wynkoop, Hallenbeck & Company.

All of Gaines' claim, whether before or after representations made to Wynkoop & Co., constitutes a debt of the Paris Modes
24 Company. No other creditor than Wynkoop & Co. can complain of that debt, and the one creditor who can complain must assert (under the Referee's findings of fact) not that the money is not owed, but that he is specifically injured because the debt exists.

I can perceive neither law nor justice in turning the dividend upon the part of Gaines' claim into a general fund for distribution to creditors who could not complain thereof. The only manner in which Gaines can be postponed to Wynkoop & Co. is to pro tanto correct the wrong found to exist by paying to Wynkoop & Co. the dividend on a debt Gaines created to the pecuniary injury of Wynkoop & Co.

The Referee's order is affirmed.

Sept. 25, 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) Filed Sept. 25, 1911.

25 At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court House, in the Postoffice Building, City of New York, on the 27th Day of September, 1911.

Present—Hon. Charles M. Hough, District Judge.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

The petition of Thomas J. Gaines, Jr., a creditor of the above-named bankrupt, to review the order of the Referee, dated August 3, 1911, having duly come on to be heard before this Court on September 20, 1911.

On reading and filing the petition for review, dated August 9, 1911, the certificate of Hon. Stanley W. Dexter, Referee, dated September 7, 1911, with the papers therein recited and therewith submitted, and the notice of motion herein, and upon all the papers and proceedings had and taken herein, and after hearing Brush & Crawford, Esqs., of Counsel for Thomas J Gaines, Jr., in support of said petition, and William Otis Badger, Jr., and Louis J. Wolff, of counsel for the Wynkoop Hallenbeck Crawford Company, in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that said petition be and the same hereby is in all respects denied, and it is

26 Further ordered, that the order of the Referee, dated August 8, 1911, be and the same hereby is affirmed and approved.

C. M. H., *U. S. D. J.*

(Endorsed:) Filed Sept. 27, 1911.

27 United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 178.

In the Matter of THE PARIS MODES COMPANY, Bankrupt; THOMAS J. GAINES, JR., Petitioner-Appellant.

Argued March 4, 1912. Decided April 8, 1912.

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward and Noyes, Circuit Judges.

This cause comes here upon appeal from and on petition to revise an order of the District Court, Southern District of New York, sitting in bankruptcy. The controversy is between the appellant Gaines, a creditor of the bankrupt and another creditor The Wynkoop, Hallenbeck, Crawford Company, hereinafter called the Wynkoop Company. The estate of the bankrupt has been wound up and final dividend to creditors about 3½% has been declared. The order sought to be reviewed and which is dated August 3rd, 1911, directed that the dividend on $199,000 of Gaines' claim be paid to the Wynkoop Company.

The bankrupt carried on business as a manufacturer of patterns for women's clothing and in connection therewith published a magazine. The Wynkoop Company printed the magazine and its claim against the bankrupt's estate ($24,120.80) is for balance due for work done in printing such magazine. Gaines owned a half interest in the bankrupt company; he himself, his mother and his 28 uncle had advanced large sums of money on notes of the Modes Company to keep the concern in business. The

mother and uncle had assigned their claims to him and the amount of $325,500 was found by the referee, without dispute, to be the amount due to him from the bankrupt's estate.

The Wynkoop Company was, as has been stated, the printer of the Paris Modes magazine. For some time the work was done for cash or on "thirty day account," the bankrupt being supplied with money through the advances of Gaines and his relatives. In the spring of 1909, the bankrupt asked the printing company for ninety days' additional credit. The latter thereupon applied to Dun's Mercantile Agency for a report of financial condition and was informed that the treasurer of the Modes Company (Gaines) had stated in September, 1908, that it owed nothing but short time current bills. Upon the strength of this report the printing company extended the credit. At that time, $199,000 was due for the advances referred to above. The referee took testimony and without going into details of his report it is sufficient to say that he found that, without any fraudulent intent, Gaines made to the representative of the Mercantile Agency the statement as to the indebtedness above set forth. Thereupon on June 22nd, 1911, it was ordered that the order of the referee allowing the claim of Gaines at $325,500 be modified to the extent that so much of this allowance as represented indebtedness of the bankrupt which existed on Sept. 30, 1908, shall be postponed to the claim of the Wynkoop Co. That order was not appealed from.

LACOMBE, *C. J.*:

There is no occasion to go back of the order of June 22nd, 1911, or to enquire into its propriety. No appeal was taken or petition to review filed and appellant here concedes that it lays down the rule for distribution in this case and announces that he has no criticism to make as to the propriety of that rule. That is to say, although in his opinion the facts did not warrant the adoption of such a rule, he is willing to accept it and let the case be disposed of in conformity to its terms.

It provides that the claim of Gaines allowed at $325,000 be modified to the extent that so much of it as represented indebtedness which existed September 3rd, 1908, $199,000 be postponed to the claim of the Wynkoop Company. This is a very simple proposition. There is to be no dividend paid to Gaines on account of the $199,000 until dividends shall have been paid to the Wynkoop Company sufficient to pay their claim in full. In other words so far as these two interests are concerned the situation is the same as if no claim for the $199,000 had ever been proved.

Of course this order did not affect the Gaines' claim, even as to the $199,000, except so far as the Wynkoop Company was concerned. The whole claim $325,000 was a proper one against the estate duly allowed and must figure as such in determining the amount of dividend payable generally. This we understand was done, and upon that basis a dividend of 3½% was declared generally. Upon the payment of 3½% on their several claims to all the creditors other than Gaines and the Wynkoop Company there remained in the trus-

tee's hands about $12,250. We get at these figures in this way: Three and a half per cent. on Gaines' whole claim ($325,000) is $11,375. The same per cent. on the Wynkoop Company's claim ($25,000 in round numbers) is $875. The total amount undistributed is, therefore, about $12,250.

This sum should be distributed between Gaines and the Wynkoop Company on the special adjustment prescribed for them. That is to say with all the claims of Gaines for dividends on $100,000 postponed to Wynkoop Company; that is substantially eliminated—treated as if it were non-existent. This will leave these two to divide the residue proportionately to their real claims: Gaines $125,000, Wynkoop Co., $25,000.

It is easier to do the figuring in round numbers—assuming

Gaines	$125,000
Wynkoop Co.	25,000
	$150,000

Of these claims Gaines holds 5/6 and the Wynkoop Company 1/6. The residue should be divided in the same proportion.

5/6 to Gaines	$10,208.33
1/6 Wynkoop Co.	2,041.67
	$12,250.10

The difficulty with the plan, followed by the District Court is,—
first, that it does not accord with the order of June 22; and
second, it takes money awarded to Gaines as a dividend on his claim of $100,000, and turns it over to the Wynkoop Company—as damages for a tort, which we think the bankruptcy court has not jurisdiction to do. The company can take that cause of action in a State court and try it there; this we understand it has done.

The order is reversed and cause remanded with instructions to distribute the balance of dividends $12,250 or whatever it may be in accordance with the views expressed in this opinion.

J. J. Crawford, for the Appellant.
L. J. Wolff, for the Appellee.

31 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of April, one thousand nine hundred and twelve.

Present:

Hon. E. Henry Lacombe,
Hon. Henry G. Ward,
Hon. Walter C. Noyes,
Circuit Judges.

In the Matter of the Paris Models Company, Bankrupt; Thomas J. Gaines, Jr., Petitioner-Appellant.

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs and the cause remanded with instructions to take further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

32 Endorsed: United States Circuit Court of Appeals, Second Circuit. In re Paris Models Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 18, 1912. William Parkin, Clerk.

33 United States Circuit Court of Appeals for the Second Circuit.

Wyckoff, Hallenbeck, Crawford Company, Appellant,
against
Thomas J. Gaines, Appellee.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and it is hereby allowed as prayed.

Dated, New York, April 30th, 1912.

E. HENRY LACOMBE,
United States Circuit Judge, Second Circuit.

34 United States Circuit Court of Appeals for the Second Circuit.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellant,
against
THOMAS J. GAINES, Appellee.

To the United States Circuit Court of Appeals for the Second Circuit:

The above mentioned appellant, Wynkoop Hallenbeck Crawford Company, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment or decree has herein been rendered on the 18th day of April, A. D. 1912, reversing the decree of the District Court of the United States for the Southern District of New York, and that the matter in controversy in said suit exceeds Two thousand ($2,000) Dollars, besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause with all things concerning
35 the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WILLIAM OTIS BADGER, Jr.,
Attorney for Appellant.

Office and P. O. Address, No. 100 William Street, Borough of Manhattan, City of New York.

36 Endorsed: U. S. Circuit Court of Appeals, Second Circuit. Wynkoop Hallenbeck Crawford Company, Appellant, against Thomas J. Gaines, Jr., Appellee. Petition for Appeal and Order Allowing Appeal. William Otis Badger, Jr., Attorney for Appellant, 100 William Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Ap'l 30, 1912. William Parkin, Clerk.

37 United States Circuit Court of Appeals for the Second Circuit.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellee,
against
THOMAS J. GAINES, Appellee.

The appellant in the above entitled cause, in connection with its petition for appeal herein, presents and files herewith its assignment of errors, as to which matters and things it says that the decree entered herein on the 18th day of April, 1912, is erroneous, to wit:

First. In holding and deciding that the order of distribution of the District Court was erroneous and in reversing the order of said District Court.

Second. In holding and deciding that the order of the District Court was not in conformity with the prior order of said court from which no appeal was taken, nor petition to review filed, and in effect reversing the said prior order.

Third. In holding and deciding that the appellee is entitled to approximately 5/6 of the dividend declared upon the postponed portion of his claim.

Fourth. In giving an improper effect to the word "postponed" in the said prior order of the District Court, and laying down a mathematical rule of distribution which is contrary to the legal distribution enunciated by this court in its opinion.

38 Fifth. In not affirming the decree of the District Court as a proper adjustment of the equities found to exist between the parties hereto.

Wherefore, the appellant prays that the said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

WILLIAM OTIS BADGER, Jr.,
Attorney for Appellant.

Office and P. O. Address, No. 100 William Street, Borough of Manhattan, City of New York.

39 (Endorsed:) U. S. Circuit Court of Appeals, Second Circuit. Wynkoop Hallenbeck Crawford Company, Appellant, against Thomas J. Gaines, Jr., Appellee. Assignment of Errors. William Otis Badger, Jr., Attorney for Appellant, 100 William Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 30, 1912. William Parkin, Clerk.

40 United States Circuit Court of Appeals for the Second Circuit.

WYNKOOP, HALLENBACK, CRAWFORD COMPANY, Appellant,
against
THOMAS J. GAINES, Appellee.

Whereas, the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in favor of said appellee and against said appellant in the Circuit Court of Appeals for the Second Circuit on the 18th day of April, 1912.

Now, therefore, the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, and having its principal office in the City of Baltimore, and lawfully transacting business in the State of New York, and having its principal office in said state at No. 100 William Street, in the Borough of Manhattan, in the City and State of New York, does hereby pursuant to statute in such case made and provided, undertake that said appellant shall prosecute said appeal to effect and answer all damages and costs, if it fails to make said appeal good not exceeding the sum of Two Hundred and Fifty ($250.) Dollars.

Dated, New York, April 30th, 1912.

MARYLAND CASUALTY COMPANY,
[SEAL.] By EDWARD G. EIBLER, *Attorney in Fact.*

Attest:

M. A. JAMISON,
Attorney in Fact.

41 Form No. 48. G. F. S.

STATE OF NEW YORK,
County of New York, New York, ss:

On the 30th day of April in the year one thousand nine hundred and twelve, before me personally came Edward G. Eibler to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he was Attorney-in-fact of the Maryland Casualty Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to such instrument is such corporate seal and was affixed hereto by authority of a Resolution passed by the Board of Directors of the Maryland Casualty Company at its regular meeting held December 12th, 1911; and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Chapter 33 of the Consolidated Laws of the State of New York for the year 1909. And the said Edward G. Eibler further said that he was acquainted with M. A. Jameson and knew him to be the

Attorney-in-Fact of said Company; that the signature of the said M. A. Jameson subscribed to the within instrument is to the genuine handwriting of said M. A. Jameson and was subscribed thereto by like authority of the aforesaid Resolution, and in the presence of him the said Edward G. Eibler.

WILLIAM L. McGINTY,
Commissioner of Deeds, New York City, #24.

Extract from the Minutes of a Meeting of the Board of Directors of the Maryland Casualty Company of Baltimore, Held in the Office of the Company, at Baltimore, Maryland, on the 12th day of December, 1911.

At a regular meeting of the Board of Directors of the Maryland Casualty Company, of Baltimore, held in the office of the Company, at Baltimore, Maryland, on the 12th day of December, 1911, the following Resolution was adopted.

"Resolved, That Edward G. Eibler, M. A. Jameson, E. J. Dowling, Benjamin Brooks, James J. Mahoney and Wm. C. Mulvey, Attorneys-in-Fact of this Company, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require."

I, M. A. Jameson, Attorney-in-Fact of the Maryland Casualty Company, of Baltimore, do hereby certify that the aforegoing is a true and correct copy of a Resolution of the Board of the Directors of the Maryland Casualty Company, of Baltimore, and is the whole of said resolution.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Maryland Casualty Company, of Baltimore, at the City of New York, N. Y.

[SEAL.]

M. A. JAMESON,
Attorney-in-Fact.

Z.

Statement of the Financial Condition of the Maryland Casualty Company at Close of Business December 31, 1911.

Assets.

Stocks and bonds, market value, less accrued interest	$4,478,406.76
Real Estate (Home Office Building)	818,667.16
Other Real Estate	18,932.26
Real Estate Mortgages	8,000.00
Cash in banks and office	115,220.00
Interest accrued	29,680.71
Premiums in course of collection, less than 90 days	848,320.24
Reinsured losses due from other companies	1,356.38
Salvage	1,170.29
	$6,319,753.80

Liabilities.

Capital Stock	$1,000,000.00
Premium Reserve	2,355,732.22
Reserve for unadjusted Liability Claims	967,815.00
Reserve for unadjusted claims	295,031.96
Contingent Reserve for unadjusted claims	100,000.00
Commission due on premiums in course of collection	229,046.46
Premium Tax Reserve	85,321.14
Sundry Accounts Reserve	8,052.77
Reinsurance Premiums due other companies	2,116.25
Surplus	1,276,638.00
	$6,319,753.80

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, M. A. Jameson, the Attorney-in-Fact of the Maryland Casualty Company, of Baltimore, do hereby certify that the aforegoing is a true statement of the assets and liabilities of said Company at the close of business December 31*th*, 1911.

In Testimony Whereof, I hereunto set my hand and affix the seal of the Company.

[SEAL.]

M. A. JAMESON,
Attorney-in-Fact.

Subscribed and sworn to before me—

WILLIAM L. McGINTY,
Commissioner of Deeds, New York City, #24.

42 [Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. Wynkoop Hallenbeck Crawford Company, Appellant, against Thomas J. Gaines, Jr., Appellee. Supersedeas Bond. The within undertaking is approved as to form as to the sufficiency of the surety, E. Henry Lacombe, Maryland Casualty Company of Balti-

more, 100 William St., New York City, surety. United States Circuit Court of Appeals, Second Circuit. Filed Ap'l 30, 1912. William Parkin, Clerk.

43 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Post Office Building in the Borough of Manhattan, City of New York, on the 21st day of May, 1912.

Present: Hon. E. Henry Lacombe, Henry C. Ward, Walter C. Noyes, Circuit Judges.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellant,
against
THOMAS J. GAINES, Jr., Appellee.

Ordered that the annexed Findings of Fact and Conclusions of Law be entered nunc pro tunc as of the 18th day of April, 1912, and together with the petition of the appellant dated July 20, 1910, herein, be made a part of the record in this case.

E. HENRY LACOMBE, *U. S. C. J.*

44 United States Circuit Court of Appeals for the Second Circuit.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellant,
against
THOMAS J. GAINES, Jr., Appellee.

The Wynkoop Hallenbeck Crawford Company having appealed to the Supreme Court of the United States from the decision of this court herein, the court in pursuance of General Order XXXVI makes the following findings of fact and its conclusions thereon.

Findings of Fact.

I. That on the 28th day of March, 1910, the Paris Modes Company, a corporation organized under the laws of the State of New York, was duly adjudged a bankrupt by the District Court of the United States for the Southern District of New York.

II. That Thomas J. Gaines, Jr. proved claims against said bankrupt amounting in the aggregate to $325,000., and the Wynkoop Hallenbeck Crawford Company, hereinafter for convenience called the Wynkoop Company, proved claims amounting to $24,120.80.

III. That after the claims of Gaines had been so proved, the Wynkoop Company filed a petition wherein it alleged, among other things, that Gaines, and one John S. Huyler, and others, acting in privity with them, and with their knowledge, represented to the petitioner, the Wynkoop Company, that the Paris Modes
45 Company was solvent and fully able to meet all its outstanding obligations; that such representation was made with

knowledge of its falsity and for the purpose of obtaining credit from the Wynkoop Company; and that relying and depending upon the truth of such representation, the said company extended to the Paris Modes Company and to Gaines the credit upon which the indebtedness proved by the Wynkoop Company had accrued; and in and by said petition the petitioner prayed that the claims of Gaines be reexamined and disallowed.

IV. That the referee took testimony upon the issues raised by said petition, and thereafter made and filed a decision in writing wherein he found the following facts: The bankrupt carried on business as a manufacturer of patterns for women's clothing and in connection therewith published a magazine. The Wynkoop Company printed the magazine and its claim against the bankrupt's estate is for balance due for work done in printing such magazine. Gaines owned a half interest in the bankrupt company; he himself, his mother and his uncle had advanced large sums of money on notes of the Modes Company to keep the concern in business. The mother and uncle had assigned their claims to him and the amount of $325,500. was found by the referee, without dispute, to be the amount due to him from the bankrupt's estate. The work of the Wynkoop Company in printing the Paris Modes magazine had been done for some time for cash or on "thirty day account," the bankrupt being supplied with money through the advances of Gaines and his relatives. In the Spring of 1909, the bankrupt asked the printing company for ninety days additional credit. The latter thereupon applied to Dun's Mercantile Agency for a report of financial condition and was informed that Gaines, then the treasurer of the Modes Company, had stated on September 3rd, 1908, that it owed nothing
46 but short time current bills. Upon the strength of this report the Wynkoop company extended the credit. At that time, $199,000. was due for the advances above mentioned. The referee found that, without any fraudulent intent, Gaines made to the representative of the Mercantile Agency, the statement as to indebtedness above set forth.

V. That upon the facts so found by him, the referee concluded that it being unnecessary to prove an actual fraudulent intent to work an estoppel, Gaines, if he had held the claims in his own right, would have been precluded from showing that on September 3rd, 1908, the Paris Modes Company owed for anything except current bills so far as related to the enforcement of his own claim in competition with the Wynkoop Company; but the referee further concluded that as Gaines was asserting no claim which accrued to himself, but only claims which accrued to his uncle and his mother, nothing was a defense as against him which could not have been urged against the assignors, if no transfer had been made; and the referee thereupon decided that the prayer of the petition should be denied, and that Gaines should be allowed to participate equally with the Wynkoop Company in any dividends.

VI. That the Wynkoop Company having filed a petition to review the decision of the referee, the District Judge affirmed the findings

of fact; but held that the rule of law applied by the referee ought not to be accepted as correct, and thereupon made an order dated the 22nd of June, 1911, directing "that the order of the Referee allowing the claim to Thomas J. Gaines, Jr., at the sum of Three hundred and twenty-five thousand five hundred Dollars upon the list of claims herein, be and the same hereby is modified to the
47 extent that the claims presented by Thomas J. Gaines, Jr., representing indebtedness of the bankrupt, which existed on the 3rd day of September, 1908, shall be postponed to the claims of the Wynkoop, Hallenbeck Crawford Company."

VII. That thereafter, the referee made a further order, dated August 3rd, 1911, as follows: "Ordered, that the dividend on the sum of One hundred ninety-nine thousand dollars of the claim of Thomas J. Gaines, Jr., being that portion of the claim representing indebtedness of the bankrupt at the time of the misrepresentations, be paid to the Wynkoop, Hallenbeck, Crawford Company."

VIII. That a petition to review the last mentioned order of the referee having been filed by Gaines, said order was affirmed by the District Court, whereupon Gaines took an appeal from said order of affirmance to the United States Circuit Court of Appeals for the Second Circuit, and also filed a petition to revise the same.

IX. That neither party appealed from the order of the District Court, dated the 22nd of June, 1911, which modified the decision of the referee, nor took any other proceeding to have that order reviewed.

Conclusions of Law.

I. That the order of the referee dated the 3rd of August, 1911, wherein the dividend on the sum of $199,000, of the claim of Thomas J. Gaines, Jr. was ordered to be paid to the Wynkoop Hallenbeck Crawford Company, and the order of the District Court affirming said order, are erroneous and should be reversed.

II. That in computing the amount of dividends payable to creditors other than to Gaines and the Wynkoop Hallenbeck Crawford Company, the claims of Gaines were properly allowed for the
48 sum *sum* of $325,500.

III. That the amount of the dividends to such other creditors should be deducted from the total sum available for dividends, and the balance remaining should be distributed between Gaines and the Wynkoop Hallenbeck Crawford Company in proportion to the amount of their respective claims, after deducting from Gaines' claims of $325,500, the indebtedness of $199,000 which existed on the 3rd day of September, 1908, that is to say, in the proportion of 126,500./150,620.80 to Gaines, and 24,120.80/150,620.80 to the Wynkoop Hallenbeck Crawford Company.

IV. From the amounts thus ascertained to be the proper dividends payable to Gaines and to the Wynkoop Hallenbeck Crawford Company, respectively, there should be deducted whatever sums may

have already been paid to them respectively as dividends and the respective balances of dividends should be now paid.

May 20th, 1912.

R. HENRY LACOMBE,
Circuit Judge.

H. G. WARD,
Circuit Judge.

WALTER C. NOYES,
Circuit Judge.

49 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Wynkoop Hallenbeck Crawford Company, plaintiff, against Thomas J. Gaines, Jr., appellee. Order, Findings of Fact and Conclusions of Law. Brush & Crawford, Attorneys for Appellee, 30 Broad Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed May 20, 1912. William Parkin, Clerk.

50 United States District Court, Southern District of New York.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

To Hon. Stanley W. Dexter, Referee in Bankruptcy:

The petition of the Wynkoop Hallenbeck Crawford Company respectfully shows:

I. That your petitioner is a creditor of this bankrupt in the amount of Twenty-five thousand dollars ($25,000.00) and upwards. That proof of your petitioner's claim has been duly filed and allowed in this estate.

II. That on the 11th day of April, 1910, there was filed in this estate a claim of one Thomas J. Gaines, Jr., for an amount exceeding Two hundred and twenty-five thousand dollars ($225,000.00), which said claim was duly allowed. That this claim is evidenced by promissory notes of John S. Huyler and others endorsed to the claimant aforesaid prior to the bankruptcy, which appear on their face to represent loans made to the bankrupt corporation at various times during the period of over five years prior to the filing of the petition herein.

III. That in the course of the first meeting of creditors examination was duly made by the Trustee's attorney herein and by
51 your petitioner's counsel, and that said examination disclosed that these notes were given by the said Thomas J. Gaines, Jr., acting as Treasurer or President of this bankrupt corporation and without the knowledge of the other creditors.

IV. That in the course of the examination at the first meeting of creditors it has duly appeared that this corporation has from its inception been insolvent, but that knowledge of its insolvency has been

purposely concealed from its creditors by Thomas J. Gaines, Jr., John S. Huyler and others.

V. That during the years 1906, 1907, 1908, 1909, and 1910, and prior to the commencement of this proceeding, the said Thomas J. Gaines, Jr., John S. Huyler and others, acting in privity with them and with their knowledge, represented to your petitioner that the said Paris Modes Company was amply solvent and fully able to meet all its outstanding obligations. That this representation was made with knowledge of its falsity and for the purpose of obtaining credit from your petitioner and others. That relying and depending upon the truth of the aforesaid representations, your petitioner did extend to this bankrupt corporation and to Thomas J. Gaines, Jr., the credit upon which the present indebtedness hereinbefore mentioned accrued.

VI. That in the year 1905 and subsequent to the filing of the certificate of incorporation, this bankrupt through its duly recognized officers, violated the statute of the State of New York in such cases made and provided, which acts in violation of the said statute are hereinafter more fully set forth as follows:

(a) That the said corporation, its stockholders and di-
52 rectors, failed to subscribe to that proportion of the capital stock required by the said statute to be subscribed.

(b) That the said corporation, its stockholders and directors, failed to pay in that proportion of the capital stock agreed mutually by them to be issued.

(c) That no certificates of stock of the said corporation have been issued since the incorporation of the said bankrupt.

(d) That the said corporation, its directors and stockholders, have failed to comply with the statute in such cases made and provided, in that the fifty per cent. of the capital stock of the said corporation required by law to be fully paid within one year from the date of the incorporation, has never been subscribed or paid in.

(e) That said corporation commenced business contrary to the provisions of said statute, without any capital stock or capital whatsoever being paid in.

(f) That the said corporation, its officers, directors and stockholders, have failed to comply with the by-laws and certificate of incorporation filed by it in the holding of meetings of the stockholders or directors.

VII. That the said claim of Thomas J. Gaines, Jr., is evidenced by notes of the corporation which are not signed and countersigned as required by the By-laws of the said corporation and do not appear to have been made with the knowledge or consent of the directors or stockholders thereof.

VIII. That on or about the 25th day of January, 1910, and within four months prior to the bankruptcy proceedings, the said
53 Thomas J. Gaines, Jr., with knowledge of the insolvency of the corporation, did obtain from said corporation a preferential payment in the sum of Fifteen hundred dollars ($1,500.00).

Wherefore, your petitioner prays that the claim of the said

Thomas J. Gaines, Jr., be re-examined and disallowed, and that said claimant be directed forthwith to pay to the Trustee herein the sum of Fifteen hundred dollars ($1,500.00) with interest thereon from the 25th day of January, 1910.

Dated, New York, July 20th, 1910.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, *Petitioner*,
By WILLIAM OTIS BADGER, Jr., *Attorney*.

54 STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

I, William Otis Badger, Jr., attorney for the petitioning creditor, Wynkoop Hallenbeck Crawford Company, mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained in said petition are true according to the best of my knowledge, information and belief.

That this verification is made by me by reason of the absence of Harry C. Hallenbeck, Jr., the officer of the corporation within whose knowledge the transactions referred to in said petition were had; that said Harry C. Hallenbeck, Jr., is now out of the State of New York, not expecting to return until the 26th day of July, 1910; that the facts set forth in said petition are within my knowledge by reason of the documents and other evidence placed in my hands by said Harry C. Hallenbeck, Jr.

WILLIAM OTIS BADGER, JR.

Subscribed and sworn to before me this 20th day of July, 1910.
[L. S.] W. O. BADGER,
Notary Public, Kings County.

Certificate filed in New York County.

55 [Endorsed:] 4351. U. S. District Court, Southern Dist. of N. Y. In the Matter of the Paris Modes Company, Bankrupt. Copy. Petition for Re-examination of Claim of Thomas J. Gaines, Jr. William Otis Badger, Jr., attorney for petitioner, 100 William Street, New York City, N. Y. Submitted by Brush & Crawford, att'ys for appellee. United States Circuit Court of Appeals, Second Circuit. Filed May 20, 1912. William Parkin, Clerk.

56 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 55 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the matter of Paris Modes Company, Bankrupt, Wynkoop, Hallenbeck, Crawford Company, Appellant, as the same remain of record

and on file in my office, made up pursuant to General Order XXXVI in bankruptcy.

In testimony whereof, I have caused the seal of the said Court to be affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of May in the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the said United States the One Hundred and Thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

57 The United States Circuit Court of Appeals, Second Circuit, the United States of America, Second Circuit, to Thomas J. Gaines, Jr.:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, thirty (30) days after the date of this citation pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Wynkoop Hallenbeck Crawford Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness: Hon. E. Henry Lacombe, Judge of the United States Circuit Court of Appeals for the Second Circuit, this 21st day of May, A. D. 1912.

E. HENRY LACOMBE,
Judge of the United States Circuit Court of Appeals, Second Circuit.

58 [Endorsed:] 4351. U. S. Circuit Court of Appeals, Second Circuit. Wynkoop Hallenbeck Crawford Company, appellant, Thomas J. Gaines, Jr., appellee. (Original.) Citation. William Otis Badger, Jr., attorney for appellant, 100 William Street, New York City, N. Y. Copy received May 22/12. Brush & Crawford, attorneys for appellee. United States Circuit Court of Appeals, Second Circuit. Filed May 23 1912. William Parkin, Clerk.

59 Supreme Court of the United States, Oct. Term, 1912.

No. 689.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appellant,
against
THOMAS J. GAINES, Jr., Appellee.

It is hereby stipulated and consented that copies of the following papers be filed in the office of the Clerk of this Court and made a part of the record herein, viz:

The Petition to Revise filed by Thomas J. Gaines, Jr., in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit on the 6th of October, 1911.

The Petition for Appeal filed by Thomas J. Gaines, Jr. in the office of the Clerk of the District Court for the Southern District of New York, on the 28th of September, 1911, and the Allowance thereof.

The Assignment of Errors filed by Thomas J. Gaines, Jr., in the office of the Clerk of the said District Court on the 28th of September, 1911.

The order of the said Circuit Court of Appeals made herein on the 17th of November, 1911, and filed in office of the Clerk of said Circuit Court of Appeals on the 17th of November, 1911.

And it is further stipulated that the copies hereunto annexed are true and correct copies of the originals thereof, and certification thereof is hereby waived.

Dated, New York, October 22nd, 1912.

HECTOR M. HITCHINGS,
Counsel for Appellant.

JOHN J. CRAWFORD,
Counsel for Appellee.

60 United States District Court, Southern District of New York.

No. 13376. In Bankruptcy.

In the Matter of THE PARIS MODES COMPANY, Bankrupt.

THOMAS J. GAINES, JR., Appellant,

WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Respondent.

To the United States Circuit Court of Appeals for the Second Circuit:

The Petition of Thomas J. Gaines, Jr., respectfully shows to the Court:

I. That heretofore, Stanley W. Dexter, the Referee duly appointed herein, filed in the District Court for the Southern District of New York, his report, wherein and whereby he allowed claims presented against the estate of the bankrupt by your petitioner, upon promissory notes of the bankrupt, amounting to $325,500, and
61 found that your petitioner was entitled to participate in any dividends equally with the Wynkoop Hallenbeck Crawford Company, which had presented claims amounting to $26,759.61.

II. That in and by his said report, the Referee also found that on the 3rd day of September, 1908, your petitioner stated to a reporter for the R. G. Dun Mercantile Agency that the Paris Modes Company was then "owing nothing but short time current bills," which statement was communicated by said agency seven months thereafter, to wit, on the 14th day of May, 1909, to the Wynkoop

Hallenbeck Crawford Company, which in reliance thereon, extended a credit to the bankrupt; but concerning the statement so found to have been made by your petitioner, the Referee further found as follows: "His Company was not asking for credit at the time, and no particular harm could then result from such a gratuitous statement. I conclude (with some hesitation in view of Mr. Gaines' denial) that he made substantially the statements attributed to him in the Report (Exhibit H), but without fraudulent intent, for no credit was then sought."

III. That in and by his said report the Referee further found that of the indebtedness of $325,500 proved by your petitioner and allowed by the Referee, $199,500 existed on the 3rd day of September, 1908, and $126,000 was contracted after that date.

IV. That in and by his said report, the Referee further found that at the time the said representations were made, your petitioner had no interest in the indebtedness represented by said notes, and that the subsequent assignment of the same to your petitioner vested in him all the rights of the assignor, unaffected by the said representation, and that therefore your petitioner was not estopped from proving any of said notes.

62

V. That the Wynkoop Hallenbeck Crawford Company filed its petition for a review of the said report of the Referee, and thereafter, to wit, on the 22nd of June, 1911, the District Court for the Southern District of New York made an order in the following form: "Ordered, that the order of the Referee allowing the claim of Thomas J. Gaines, Jr., at the sum of Three hundred and twenty-five thousand five hundred Dollars ($325,500) upon the list of claims herein, be and the same hereby is modified to the extent that the claims presented by Thomas J. Gaines, Jr., representing indebtedness of the bankrupt, which existed on the 3rd day of September, 1908, shall be postponed to the claim of the Wynkoop Hallenbeck Crawford Company."

VI. That after the said order of the District Court was made and entered, the Referee on the 3rd day of August, 1911, made a further order as follows: "Ordered, that the dividend on the sum of One hundred ninety-nine thousand Dollars ($199,000) of the claim of Thomas J. Gaines, Jr., being that portion of the claim representing indebtedness of the bankrupt at the time of the misrepresentations, be paid to the Wynkoop, Hallenbeck, Crawford Company."

63

VII. That thereafter your petitioner filed a petition for a review of the last mentioned order, and on the 27th of September, 1911, the District Court for the Southern District of New York made an order as follows: "Ordered, that the order of the Referee, dated August 3, 1911, be and the same hereby is affirmed and approved."

Wherefore, your petitioner prays that the order of the District Court last mentioned be revised by this Honorable Court, and that for the manifest errors contained therein, which are fully set forth in the assignment of errors heretofore filed in the said District Court,

the said order be reversed, and that your petitioner have such other and further relief as may be just.

Dated, New York, October 3rd, 1911.

THOMAS J. GAINES, Jr.,
Petitioner.

BRUSH & CRAWFORD,
Attorneys for Petitioner, No. 30 Broad Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

I, Thomas J. Gaines, Jr., the Petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained in said petition are true according to the best of my knowledge, information and belief.

THOMAS J. GAINES, Jr.

Subscribed and sworn to before me this 3rd day of October, 1911.

[SEAL.] HENRY J. UDERITZ,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

64 Please take notice that the within Petition for Review will be filed this day in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit.

Dated, New York, October 6th, 1911.

BRUSH & CRAWFORD,
Attorneys for Petitioner.

No. 30 Broad Street, Borough of Manhattan, New York City.

To William Otis Badger, Jr., Esq., Attorney for Wynkoop Hallenbeck Crawford Company:

I hereby admit service of the foregoing notice and of a copy of the within Petition for Review.

Dated, New York, October 6th, 1911.

W. O. BADGER, Jr.,
Attorney for Wynkoop Hallenbeck Crawford Company.

(Endorsed:) United States District Court, Southern District of New York.—In the Matter of the Paris Modes Company, Bankrupt.—Petition for Review by United States Circuit Court of Appeals, and Notice of Filing.—Brush & Crawford, Attorneys for Petitioner, 30 Broad Street, Borough of Manhattan, New York City.—Copy received, Oct. 6, 1911. W. O. Badger, Att'y for W. H. C. Co.—United States Circuit Court of Appeals, Second Circuit.—Filed Oct. 6, 1911.—William Parkin, Clerk.

65 United States District Court, Southern District of New York.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt; THOMAS J. Gaines, Jr., Appellant; Wynkoop Hallenbeck Crawford Company, Respondent.

Petition for Appeal and Allowance of Appeal.

The above-named appellant, Thomas J. Gaines, Jr., conceiving himself aggrieved by the order made and entered herein on the 27th day of September, 1911, does hereby appeal to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated September 28, 1911.

BRUSH & CRAWFORD,
Attorneys for Appellant.

No. 30 Broad Street, Borough of Manhattan, New York City.

The foregoing claim of appeal is allowed.
Dated September 28, 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) Filed Sept. 28, 1911.

66 United States District Court, Southern District of New York.

In Bankruptcy. No. 13376.

In the Matter of THE PARIS MODES COMPANY, Bankrupt; THOMAS J. Gaines, Jr., Appellant; Wynkoop Hallenbeck Crawford Company, Respondent.

Assignment of Errors.

And now, on this 28th day of September, 1911, come the appellant, Thomas J. Gaines, Jr., and says that the final order of the District Court of the United States for the Southern District of New York, entered on the 27th day of September, 1911, affirming an order of Hon. Stanley W. Bexter, the referee herein, which last-mentioned order directed that the dividends on the sum of One hundred ninety-nine thousand dollars of the claim of Thomas J. Gaines, Jr., being that portion of the claim representing indebtedness of the bankrupt at the time of the misrepresentations, be paid

to the Wynkoop, Hallenbeck, Crawford Company, is erroneous in the following particulars:

67 First. In that by the said order, and by the order of the Referee, affirmed but it, the Wynkoop, Hallenbeck, Crawford Company is given further and additional relief to that given by the prior report of the Referee, as modified by the Court, which report as so modified, conclusively settled and determined the rights of the parties.

Second. In that by the said order of affirmance, and the order so affirmed, a wrong and unwarranted effect has been given to the doctrine of equitable estoppel.

Third. In that by the said orders, the referee and Court have attempted to decide an alleged action of tort which may be determined only by an independent action.

Fourth. In that by the said order a wrong measure of damages has been adopted.

Fifth. In that by the said order of affirmance, and the orders so affirmed, this claimant has been denied a right to trial by jury in a cause of action at common law.

Wherefore, the appellant prays that the said order may be reversed.

BRUSH & CRAWFORD,
Attorneys for Appellant.

No. 30 Broad Street, Borough of Manhattan, New York City.

(Endorsed:) Filed Sept. 28, 1911.

68 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Post Office Building, in the Borough of Manhattan, in the City of New York, on the 17th Day of November, 1911.

Present:

Hon. E. Henry Lacombe,
" Alfred C. Coxe,
" Henry G. Ward,
Circuit Judges.

In the Matter of THE PARIS MODES COMPANY, Bankrupt; THOMAS J. Gaines, Jr., Appellant; Wynkoop Hallenbeck Crawford Company, Respondent.

Upon reading and filing the annexed consent of the attorneys for the respective parties herein, it is

69 Ordered, that the petition for review and the appeal herein, be submitted to this Court upon one printed record.

H. G. WARD, *U. S. C. J.*

We hereby consent to the entry of the foregoing order.
Dated November 15th, 1911.

BRUSH & CRAWFORD,
Att'ys for Thomas J. Gaines, Jr., Appellant.
WILLIAM OTIS BADGER, Jr.,
Att'y for Wynkoop Hallenbeck Crawford Company, Respondent.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit.—In the Matter of the Paris Modes Company, Bankrupt.—Consent and Order.—Brush & Crawford, Attorneys for Thomas J. Gaines, Jr., Appellant, 30 Broad Street. Borough of Manhattan, New York City.—United States Circuit Court of Appeals.—Second Circuit.—Filed Nov. 17, 1911.—William Parkin, Clerk.

70 [Endorsed:] 689/23264. Supreme Court of the United States. Wynkoop Hallenbeck Crawford Company, Appellant, against Thomas J. Gaines, Jr., Appellee. Oct. Term, 1912. No. 689. Stipulation. Brush & Crawford, Attorneys for Appellee, 30 Broad Street, Borough of Manhattan, New York City.

71 [Endorsed:] File No. 23264. Supreme Court U. S., October Term, 1912. Term No. 689. Wyncoop, Hallenbeck, Crawford Co., Appellant, vs. Thomas J. Gaines, Jr. Stipulation of counsel and addition to record. Filed October 23, 1912.

Endorsed on cover: File No. 23,264. U. S. Circuit Court Appeals, 2nd Circuit. Term No. 689. The Wynkoop, Hallenbeck, Crawford Company, appellant, vs. Thomas J. Gaines, Jr. Filed June 19, 1912. File No. 23,264.

Supreme Court of the United States

WYNKOOP HALLENBECK CRAWFORD COMPANY, Appellant, against THOMAS J. GAINES, JR., Appellee.	October Term, 1912—No. 689.

BRIEF FOR APPELLANT.

Statement.

The proceeding out of which the present appeal arises was instituted by the filing with the referee in bankruptcy of the appellant's petition (fols. 50-55) praying for the re-examination and disallowance of the appellee's claim, which constituted more than three-fourths of the liabilities of the bankrupt (fol. 10). The principal ground alleged in the petition was that Gaines, while president of the bankrupt, had materially misrepresented its financial condition, thereby securing the credit which created the claims of the appellant and of

other creditors. The findings of fact of the referee (fols. 1-16) sustained the allegations of the petition, but relief was denied because of what the referee conceived to be a proper principle of law, to wit: Gaines having become the assignee of his claim at a date later than that of his misrepresentations, he could stand upon the title of his assignor and his claim was therefore unimpeachable.

The decision of the District Court (fols. 17-20) established that this principle was not applicable and thereupon the referee made an order (fol. 23) disallowing $190,000 of the appellee's claim, which order was affirmed by the District Court (fols. 24-27), and reversed by the Circuit Court of Appeals (fols. 27-32) from which latter decision the present appeal is prosecuted.

I.

The appeal herein is properly taken under Section 25-b(1) of the Bankruptcy Act, Judicial Code Section 252.

It would seem to be clear that the present proceeding is one in bankruptcy as distinguished from a "controversy arising in bankruptcy proceedings."

Coder vs. *Arts*, 213 U. S., 223;
Hewitt vs. *Berlin Machine Works*, 194 U. S., 296;
Tefft, Weller & Co. vs. *Munsuri*, 222 U. S., 114.

By the filing of its petition the appellant instituted a proceeding in bankruptcy as to the ap-

pellee's claim under Sections 2 (7) and 57-k of the Bankruptcy Act.

In re Mueller, 135 Fed., 711.

All the subsequent steps in the proceeding were based directly upon this petition, and the decision appealed from is the final one upon such petition. It will be noted that Gaines, upon his own appeal to the Circuit Court of Appeals, invoked the jurisdiction of that court first by taking an appeal from the decision of the District Court, procuring the allowance of the same, and filing his assignment of errors within the ten days allotted for that purpose (fols. 65-68), and it was only at a later date, and seemingly as an afterthought, that his petition for review (fols. 60-64) was filed.

No decision was ever made as to which of the methods adopted by him was the correct one, the consent given by the appellant that both proceedings be submitted upon one printed record (fols. 68-70) being, of course, simply for the purpose of saving expense. Neither was the useless formality of a motion to dismiss resorted to, since in any event the controversy would have been adjudicated upon in the proper proceeding.

Fisher vs. *Cushman*, 103 Fed., 800;
In re Worcester County, 102 Fed., 808;
Lockman vs. *Lang*, 132 Fed., 1;
In re Schoenfeld, 183 Fed., 219.

The Gaines appeal to the Circuit Court of Appeals was, however, clearly taken under Section 25 (3) of the Bankruptcy Act. In the leading case of *Coder* vs. *Arts*, 213 U. S., 223, 238, this Court stated:

"It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding."

Here the proceeding was directly to disallow the Gaines claim and his only proper method of invoking the jurisdiction of the Circuit Court of Appeals was by appeal under Section 25 of the Act.

Matter of Loving, 224 U. S., 183.

The argument of the appellant proceeds upon the theory that the steps in the proceeding can be separated, and that, although originally the proceeding was for the re-examination and disallowance of the claim, yet at a certain point it terminated or changed its character, and a new one began, review of which in the Circuit Court of Appeals was proper only by petition for review under Section 24-b of the Bankruptcy Act, without any further right of appeal to this Court. Aside from the proposition, as already indicated, that this argument involves a change of front on the part of the appellee, it is untenable since there was never but the single proceeding following directly upon the filing of the appellant's original petition. There was no *res adjudicata* and the various steps in the proceeding were all based directly upon the original petition, terminating in the decision now appealed from. To sustain his position, the appellee must show that the record before the Court is that of two distinct and separate proceedings, whereas there is not the slightest trace of either a second proceeding in bankruptcy or of a "controversy arising in bankruptcy proceedings." The first decision of the District Court was in effect one upon a demurrer to a defense interposed by Gaines, hold-

ing such defense to be insufficient in law, and since no appeal was taken from it, this decision removed the defense from the proceeding. The referee, no longer bound by what he supposed to be a proper principle of law, proceeded directly under the original petition. The acid test would seem to lie in the fact that nowhere in the record of this proceeding is there to be found any semblance of the institution or commencement of a second proceeding of any sort.

The amount in controversy exceeds $2,000 (fol. 34) within the definition of this requirement in *Gray* vs. *Grand Forks Mercantile Co.*, 138 Fed., 344.

A Federal question is presented within Section 709 of the Revised Statutes, since a construction of the Bankruptcy Act is involved and the decisions below cannot be sustained without reference to its provisions. The Circuit Court of Appeals stated as one of its reasons for reversing the District Court, that the latter had accomplished a result in the proceeding, "which we think the bankruptcy court has not jurisdiction to do" (fol. 30). *U. S. Fidelity Co.* vs. *Bray*, 225 U. S., 205.

The appellee, in his brief, tacitly assumes that a Federal question is presented, since nothing is said upon this branch of the subject.

The fact that an incidental question of rank or priority of the claim may be included in this proceeding does not defeat the right of appeal. In *Cunningham* vs. *German Ins. Bank.*, 103 Fed., 932, Mr. Justice Lurton, writing for the Circuit Court of Appeals, stated:

> "The appeal from a judgment allowing or rejecting a debt or claim includes as an in-

cident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate. If the debt or claim including its lien or preference depend upon controverted questions of fact and law, the right of appeal is granted by the 25th section above set out."

The proceeding herein is one under Sections 2 (7) and 57-k of the Bankruptcy Act within the meaning of Section 25 of that Act and the present appeal is properly before this Court.

II.

The motion to dismiss should be denied.

Respectfully submitted,

WILLIAM OTIS BADGER, JR.,
Counsel for Appellant.

WILLIAM H. HOTCHKISS,
LOUIS J. WOLFF,
of Counsel.

Supreme Court of the United States.

THE WYNKOOP, HALLENBECK, CRAWFORD COMPANY,
Appellant,

vs.

THOMAS J. GAINES, JR.,
Appellee.

Oct. term, 1912.
No. 689.

Comes the appellee in this cause and moves the honorable court to dismiss the appeal herein because, he says, this court has no jurisdiction of the same, or to hear and determine the matters sought to be brought before the court by such appeal

JOHN J. CRAWFORD,
Counsel for Appellee.

To:

HECTOR M. HITCHINGS, Esq.,
Counsel for Appellant.

You are hereby notified, that the appellee in the above named cause will, on the sixth day of January, 1913, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit

for the consideration of the Court the foregoing motion, and the brief hereto attached.

JOHN J. CRAWFORD,
Counsel for Appellee,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

Service of the above notice of motion and of a copy of the brief hereto attached is admitted this 14th day of December, 1912.

HEGTOR M. HITCHINGS,
Counsel for Appellee.

Supreme Court of the United States.

WYNKOOP HALLENBECK CRAWFORD COMPANY,
Appellant,

against

THOMAS J. GAINES, JR.,
Appellee.

October Term, 1912.
No. 689.

BRIEF FOR APPELLEE.

Statement.

This is a motion to dismiss for want of jurisdiction.

The appeal is from a decree of the Circuit Court of Appeals for the Second Circuit, reversing an order of the District Court, which affirmed an order made by a referee in bankruptcy.

The appellant, the Wynkoop Hallenbeck Crawford Company (which for brevity we will call the Wynkoop Company), and the appellee, Gaines, were both creditors of the Paris Modes Company, a bankrupt. The Wynkoop Company proved claims amounting to $24,120.80, and Gaines proved claims amounting to $325,000. The former then brought

a proceeding before the referee to have Gaines' claims re-examined and disallowed (fols. 50-53). In this proceeding the referee found that on the 3rd of September, 1908, Gaines, who was then the President of the Paris Modes Company, had stated to a reporter for Dun's Mercantile Agency, though without any fraudulent intent, that the company owed nothing except for current bills, and that the Wynkoop Company had relied upon this statement in extending credit to the Company. The referee concluded, however, that the doctrine of equitable estoppel would not apply for the reason that the claims presented by Gaines were held by him merely as assignee of his mother and uncle, and the referee decided that Gaines should be allowed to participate equally with the Wynkoop Company in any dividends. This decision was modified by an order of the District Court directing "that the order of the Referee allowing the claim of Thomas J. Gaines, Jr., at the sum of Three hundred and twenty-five thousand five hundred Dollars upon the list of claims herein, be and the same hereby is modified to the extent that the claims presented by Thomas J. Gaines, Jr., representing indebtedness of the bankrupt, which existed on the 3rd day of September, 1908, shall be postponed to the claims of the Wynkoop, Hallenbeck, Crawford Company" (fols. 21-22; 47).

Neither party having appealed from this order, the referee made a further order as follows: "Ordered, that the dividend on the sum of One hundred ninety-nine thousand dollars of the claim of Thomas J. Gaines, Jr., being that portion of the claim representing indebtedness of the bankrupt at the time of the misrepresentations, be paid to

the Wynkoop, Hallenbeck, Crawford Company" (fols. 21-22; 47-48). This order was affirmed by the District Court. Gaines then filed in the Circuit Court of Appeals a petition to revise this order of affirmance (fols. 60-64), and also took an appeal therefrom (fols. 65-66). There was no motion to dismiss either the appeal or the petition to revise, but upon the written consent of the parties, an order was made that both be submitted upon one printed record (fol. 69). The Circuit Court of Appeals then reversed the order of affirmance (fols. 31-32).

ARGUMENT.

I.

The order of reversal is not a decision "allowing or rejecting a claim."

As findings are not required in a "controversy arising in bankruptcy proceedings" (Knapp *v.* Milwaukee Trust Co., 216 U. S. 545) we may infer that the appellant, by causing such findings to be made *nunc pro tunc* (fols. 43-44), bases its right to appeal upon the ground that the order of reversal is "a final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy." (Judicial Code, Sec. 252). We may, therefore, discuss that question first.

Now, what are the facts? Both parties presented claims against the bankrupt's estate, and

the claims of both were allowed. The Wynkoop Company then brought a proceeding to have the claim of Gaines re-examined and disallowed. (Fols. 45-46; fols. 50-53.) In this proceeding the referee decided that Gaines was entitled to dividends upon his entire claim of $325,000.; but this decision was modified by the District Court, which directed that so much of Gaines' claim as represented indebtedness existing on the 3rd of September, 1908, that is to say $199,000. of the $325,000., should be postponed to the claim of the Wynkoop Company (fols. 16-17; 21-22; 46-47). Neither party appealed from the order of modification (as we shall call it for convenience) and the report of the referee, as so modified, remained in full force and effect. To carry out this adjudication, the referee made a further order, which, by its terms, was based upon the order of modification, and this order of the referee was affirmed by the District Court. The order of affirmance was then reversed by the Circuit Court of Appeals.

Upon this state of facts, the legal position of the parties appears to be plain. Their rights—whatever these may have been—were merged in the decision of the referee as modified (United States *v.* Leffler, 11 Pet. 86, 101; In re European Ry. Co. L. R. 4 Ch. Div. 33, 38), and their contentions rested, not upon their original claims, but upon this *adjudication;* for "where there is *res judicata* the original cause of action is gone, and can only be restored by getting rid of the *res judicata.*" (Lockyer *v.* Ferryman, L. R. 2 App. Cas. 519, 528, per Lord Chancellor Selborne). Any dividends, therefore, were to be paid in accordance with the adjudication; and the referee having put into the form of an order the plan upon which he

though this should be done, the Circuit Court of Appeals, in reviewing that order, was not called upon either to allow a claim or to reject a claim, but to decide this question only:—Did the plan for paying dividends as set forth in that order conform to the previous decision?

The situation in this respect is like that which sometimes occurs in suits for partition, when, the rights of the parties having been determined, the court is called upon to settle, by an order made at the foot of the decree, some dispute as to the mode of setting off the land. Or to take a modern instance, it is like that which arises when the court, having entered a judgment of dissolution against a corporation, has afterwards to decide whether the plan of dissolution proposed conforms to the judgment. And like the orders in those cases, it was merely a supplementary order, based upon the previous decision, and designed solely to give effect to that decision.

It is true that the proceeding was brought to have Gaines' claim re-examined and disallowed. But it ended in a decision by which the Wynkoop Company was given a priority over Gaines as to a part of his claims; and this decision was accepted by both parties as an adjudication of their rights. What matters, then, could be litigated after that? Certainly none that had reference to the validity or amount of the claim; but only such as should bear upon the question of *priority* as established by the decision. And even if we could say that the previous decision amounted to an allowance or rejection of a claim—which plainly it did not—how could that circumstance help the appellant? For the decision was that of the District Court only, and not "a final decision of the

circuit court of appeals"; and besides, it is not from that decision that the appellant has appealed.

When we turn to the findings and conclusions of the Circuit Court of Appeals (fols. 44-47) we discover no allowance or rejection of a claim. The conclusions of the court were merely these: (1) that for the purpose of computing the dividends payable to creditors other than to Gaines and the Wynkoop Company, Gaines claims were to be taken at the full sum of $325,000.; and (2) that after deducting the dividends so payable to the other creditors, the balance available for dividends should be divided between these two in proportion to the amount of their respective claims, after deducting from the total of Gaines claim the $199,000. due on September 3, 1908. (fol. 48). All the court undertook to do was to direct how dividends should be computed, so as to give the Wynkoop Company the priority to which it was entitled under the previous decision.

And when we turn to the assignments of error (fols. 37-39) we find that, so far as they are specific, they assign no error which goes to the allowance or rejection of a claim. The appellant asserts that the Circuit Court of Appeals erred in deciding that the order reversed was not in conformity with the previous decision; and that that court gave an improper effect to the word "postponed" in the previous decision. But such assignments point out nothing which this court can notice; on the contrary, they show that the appellant complains of rulings which this court may not review.

In J. W. Calnan Co. v. Doherty (224 U. S. 145) the point decided by the Circuit Court of Appeals was that certain petitioning creditors, who had

procured the adjudication of bankruptcy, held "provable" claims. This Court in dismissing the appeal said: "It is manifest that the ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, is not a judgment allowing or rejecting a debt or claim within the meaning of the section."

Now, in that case, the court did have to pass upon the question whether there was a claim or not. But in the present case, it had not even to decide that much. It had only to place a construction upon a previous decision of the District Court which was *res judicata*, and into which all the rights of the parties had been merged. So far as the point decided is concerned, the case is not different from that where the court has to determine the effect of a judgment in an action upon that judgment; and even though it be assumed that the prior decision was one allowing or rejecting a claim, you can no more say, in this case, that the Circuit Court of Appeals allowed or rejected a claim, than you could say, in an action upon a judgment recovered for a tort, that the court decided a question of tort.

II.

The case is not a controversy arising in bankruptcy proceedings.

As it seems manifest that the decree of the Circuit Court of Appeals is not a "final decision al-

lowing or rejecting a claim under the laws relating to bankruptcy", the appellant must sustain its right to appeal, if at all, upon the ground that the case is a "controversy arising in bankruptcy proceedings." (Bankruptcy Act, Sec. 24a). Now, it appears to be settled that what Congress meant by such a "controversy" is a suit or proceeding which in some way involves the rights or demands of persons other than creditors, as for example, where third persons claim title to property in the possession of a trustee or receiver. (Hewitt *v.* Berlin Machine Co. 194 U. S. 300; Knapp *v.* Milwaukee Trust Co. 216 U. S. 545). In Morehouse *v.* Pacific Hardware Steel Co. (177 Fed. Rep. 337, 339-340) the Circuit Court of Appeals for the ninth circuit said: "It is conceivable that the line of demarcation between 'proceedings in bankruptcy' and controversies at law and in equity, arising 'in the course of bankruptcy proceedings', may in some cases be obscure; but, generally speaking, the former include *all questions arising in the administration of the bankrupt's estate*, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, *orders giving priority to the claim of a creditor*, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the prop-

erty be in his possession or theirs." This view is supported by numerous decisions.

Barnes *v.* Pimpel, 192 Fed. Rep. 525, 527.
Thompson *v.* Manzy, 174 Fed. Rep. 611, 614.
Brady *v.* Bernard, 170 Fed. Rep. 576, 579-580.
In *re* Farrell, 176 Fed. Rep. 505.

Now, in the present case, we have no question between the trustee and an adverse claimant, but between two creditors only; and the order which was reversed by the circuit court of appeals was merely a direction as to the mode of computing the dividends payable to them. If this is not a question "arising in the administration of the bankrupt's estate," it would be difficult to find one which answers that description.

United States Fidelity Co. *v.* Bray, 225 U. S. 205, 216-218.
Tefft, Weller & Co. *v.* Munsuiri, 222 U. S. 114, 118.

III.

The decree of the Circuit Court of Appeals was made in pursuance of the power "to superintend and revise in law."

To obviate any question which might arise as to the proper mode of procedure, Gaines adopted a practice approved in other circuits (*e. g.* Lock-

man v. Long, 128 Fed. Rep. 279) and not only filed in the Circuit Court of Appeals a petition to revise (fols. 60-63) but also filed in the District Court a petition for appeal, which was allowed. (fols. 65-66). No motion was made to dismiss either of these proceedings, but instead the Circuit Court of Appeals, upon the written consent of both parties, made an order that the petition to revise and the appeal be heard upon one printed record. (fols. 69-70).

In the absence of a motion to dismiss, it was unimportant to the decision of the case by the Circuit Court of Appeals whether that court acquired jurisdiction by one mode or the other. But upon an appeal to this court that question becomes material.

In matter of Loving (224 U. S. 183, 188) this court said: "The proceedings reviewable [under Section 24b] are those administrative orders and decrees in the ordinary cause of a bankruptcy between the filing of the petition and the final settlement of the estate which are not made specially appealable under §25a". • • • "The object of §24b is rather to give a review as to matters of law, *where facts are not in controversy*, of orders of courts of bankruptcy, *in the ordinary administration of the bankrupt's estate*". (See also In *re* Charles Knosher & Co., 197 Fed. Rep. 136).

Now, the order reversed by the Circuit Court of Appeals in this case would seem to be one of this description. As it contained nothing but a direction as to the payment of a dividend, it was plainly an administrative order. Nor was any question of fact to be passed upon; the only question was one of law, viz. whether this order conformed to the prior decision. And though findings of fact were made by the Circuit Court of Appeals,

these findings are only a succinct statement of what the referee and district court had decided in the course of the proceeding. (fols. 44-49).

IV.

The appeal should be dismissed for want of jurisdiction.

JOHN J. CRAWFORD,
Counsel for Appellee.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY *v.* GAINES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 689. Motion to dismiss submitted January 6, 1913.—Decided January 20, 1913.

Where the question whether the claim against the bankrupt be allowed or not has been settled by an order of the court, questions remaining as to how the order shall be carried out are purely administrative, and as they do not involve the rejection or allowance of a claim this court has no power under § 25*b* of the Bankruptcy Act to review the decision of the Circuit Court of Appeals.

Appeal from 196 Fed. Rep. 257, dismissed.

THE facts, which involve the jurisdiction of this court of appeals under § 25*b* of the Bankruptcy Act, are stated in the opinion.

Mr. William Otis Badger, Jr., *Mr. William H. Hotchkiss* and *Mr. Louis J. Wolff* for appellant.

The appeal is properly taken under § 25*b* (1) of the Bankruptcy Act, Judicial Code, § 252. The present proceeding is one in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings. *Coder* v. *Arts*, 213 U. S. 223; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114.

By the filing of its petition the appellant instituted a proceeding in bankruptcy as to the appellee's claim under §§ 2, 7 and 57*k* of the Bankruptcy Act. *In re Mueller*, 135 Fed. Rep. 711.

All the subsequent steps in the proceeding were based directly upon this petition, and the decision appealed from is the final one upon such petition. It will be noted

that Gaines, upon his own appeal to the Circuit Court of Appeals, invoked the jurisdiction of that court first by taking an appeal from the decision of the District Court, procuring the allowance of the same, and filing his assignment of errors within the ten days allotted for that purpose and it was only at a later date, and seemingly as an afterthought, that his petition for review was filed.

No decision was ever made by the Circuit Court of Appeals as to whether the appeal or the petition to review was the proper method to reach that court. Both proceedings were taken by the appellee who was appellant in that court. Neither was the useless formality of a motion to dismiss resorted to, since in any event the controversy would have been adjudicated upon in the proper proceeding. *Fisher* v. *Cushman*, 103 Fed. Rep. 860; *In re Worcester County*, 102 Fed. Rep. 808; *Lockman* v. *Lang*, 132 Fed. Rep. 1; *In re Schoenfeld*, 183 Fed. Rep. 219.

Here the proceeding was directly to disallow the Gaines claim and his only proper method of invoking the jurisdiction of the Circuit Court of Appeals was by appeal under § 25 of the act. *Matter of Loving*, 224 U. S. 183.

The amount in controversy exceeds $2,000 within the definition of this requirement in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. Rep. 344.

A Federal question is presented within § 709, Rev. Stat., since a construction of the Bankruptcy Act is involved and the decisions below cannot be sustained without reference to its provisions. *Fidelity Co.* v. *Bray*, 225 U. S. 205.

The appellee, in his brief, tacitly assumes that a Federal question is presented, since nothing is said upon this branch of the subject.

The fact that an incidental question of rank or priority of the claim may be included in this proceeding does not defeat the right of appeal. *Cunningham* v. *German Ins. Bank*, 103 Fed. Rep. 932.

Mr. John J. Crawford for appellee.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

A corporation known as the Paris Modes Company was adjudicated a bankrupt on March 28, 1910. Gaines, the appellee, owned half of the stock of the company and was its president. His relatives, during the active life of the corporation, made large loans to the company. The claims for these advances were assigned to Gaines shortly before the bankruptcy, and he made proof of the same in the bankruptcy proceeding. Subsequently the Wynkoop, Hallenbeck, Crawford Company, the appellant, a creditor of the bankrupt estate which had proved its claim, filed an intervening petition asking for the reëxamination and disallowance as against it of the Gaines claim. The ground for the relief prayed was that Gaines was equitably estopped from collecting his claim against the bankrupt estate to the prejudice of the petitioner because of misrepresentations and concealment of material facts as to the financial condition of the bankrupt made by him as an officer of the company, upon which the intervening company relied to its injury. The referee found that Gaines had made the representations complained of and that although intentional fraud on his part was not shown, yet if he had been the owner and holder of the notes upon which he had proved at the time of the making of the statements they were of such a character as to cause him to be equitably estopped from asserting the claims to the prejudice of the intervenor. As, however, it was found that Gaines had no interest in the claims embraced in his proof of debt at the time the representations were made by him, because he had acquired the claims by assignments subsequent thereto, the referee concluded that Gaines was entitled to assert the rights of his assignors and was not

estopped as against the Wynkoop, Hallenbeck, Crawford Company. In reviewing the action of the referee the District Court disapproved the same, and, on June 22, 1911, directed that the claim of Gaines, in so far as it represented demands against the bankrupt which were in existence at the time the representations were made by Gaines, should be postponed to the claim of the intervenor. Neither party appealed from this order.

Thereafter, on August 3, 1911, the referee made an order that the dividend on the sum of $199,000 of the claim of Gaines, being the portion representing the indebtedness at the time of the misrepresentations, should be paid to the intervenor. On petition to review, this order was affirmed by the District Court. Gaines then carried the matter, by both appeal and petition for review, to the Circuit Court of Appeals, complaining of the mode of distribution which had been adopted to execute the decree of June 22, 1911. That the controversy was thus limited and that no issue was raised or contention made concerning the decree of June 22, 1911, itself, which had become final, is certain. Thus, in August, 1912, in announcing its decision, the Circuit Court of Appeals thus stated the controversy before it: "There is no occasion to go back of the order of June 22, 1911, or to inquire into its propriety. No appeal was taken or petition to review filed, and appellant here concedes that it lays down the rule for distribution in this case, and announces that he has no criticism to make as to the propriety of that rule. That is to say, although in his opinion the facts did not warrant the adoption of such a rule, he is willing to accept it and let the case be disposed of in conformity to its terms."

The court then considered whether the distribution ordered by the referee and approved by the District Court accorded with the order of June 22, 1911, and held that it did not, and directed distribution of $12,250, the

balance of dividends in the hands of the trustee, in accordance with views expressed in the opinion. 196 Fed. Rep. 357. The Wynkoop Company thereupon prosecuted this appeal, and a motion has been made to dismiss the same for want of jurisdiction.

That the motion to dismiss must be granted is manifest from the statement we have made. Whatever may have been the nature of the original controversy presented by the intervention of the Wynkoop Company, the acquiescence of both parties in the order of June 22, 1911, settled that controversy, and the questions remaining were purely administrative, concerning as they did merely the carrying out of the order according to its true intent and purpose. This being the case, the question whether the order of June 22, 1911, was correctly interpreted by the referee and the District Court in the distribution directed by the subsequent administrative order is not one concerning an allowance or rejection of a claim within § 25*b* of the Bankruptcy Act, but is a matter arising in the administration of the bankrupt estate, which we are not empowered to review.

Appeal dismissed.